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No. 80-2199

In the Supreme Court of the United States

October Term, 1980

KENNETH SNYDER,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

1. The petitioner was not prejudiced by the representation of his court-appointed counsel for his appeal because no conflict of interest issue exists.

2. The petitioner received competent and adequate assistance of counsel both at the trial and appeal stages of these proceedings.

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

HISTORY OF THE CASE

Petitioner was indicted by the Cuyahoga County Grand Jury on December 14, 1977 for two counts of aggravated robbery, in violation of Ohio Revised Code, Section 2911.01, alleging the use of a gun, and one count of drug law violation of Ohio Revised Code, Section 2925.21, obtaining Schedule II drugs. Petitioner failed to appear for his initial arraignment date and a capias was issued on January 6, 1978. Petitioner was subsequently arraigned on January 13, 1978. On March 28, 1978 another capias was issued when petitioner failed to appear at the pre-trial. After various pre-trials, a trial by jury commenced on May 3, 1978. On May 11, 1978, the jury returned a verdict of guilty on all three counts of the indictment.

On May 25, 1978 petitioner filed a Motion for New Trial, and on November 28, 1978 petitioner filed a Motion of New Trial Based Upon Newly Discovered Evidence. On December 6, 1978, the State filed its response to the aforesaid motion. The Motions for a New Trial were denied by the Court.

On March 19, 1979, petitioner filed his appellate brief and assignments of error with the Court of Appeals, Eighth Judicial District of Ohio. On November 15, 1979, petitioner filed with the Court of Appeals a Motion for Delayed Appeal with Brief.

On July 22, 1980 this case was heard by the Court of Appeals. Throughout the foregoing appellate procedure, the petitioner was represented by assigned counsel, Mr. Robert A. Ruggeri.

On August 27, 1980, petitioner, through new counsel Mr. Christopher Stanley, filed a Motion for Leave to File Brief Instanter and for New Oral Hearing. This motion

was overruled by the Court of Appeals on September 8, 1980.

On September 11, 1980 the Court of Appeals unanimously affirmed the judgment of the trial court.

On January 8, 1981, petitioner, again with new counsel, Christopher Stanley, filed his memorandum seeking the jurisdiction of the Supreme Court of the State of Ohio. On March 11, 1981, the Supreme Court of the State of Ohio overruled defendant's motion.

STATEMENT OF THE FACTS

Kenneth Snyder was indicted by the Cuyahoga County Grand Jury with Thomas Hurley for the aggravated robbery and theft of drugs which occurred at the Upson Pharmacy, Euclid, Ohio, July 28, 1977.

At the trial, the victims, Barbara Skebe, Berta Kornfeind and Alex Saferin, testified that they were on duty at approximately 1:30 p.m. July 28, 1977 when they were robbed by two armed men (R. 18, 28, 47). On direct examination Mrs. Skebe was not asked to make an in-court identification, but did indicate that she had picked one of the robbers from a group of photos shortly after the crime (R. 19). On cross-examination Mrs. Skebe positively identified the petitioner Kenneth Snyder (R. 25). Detective Trobenter testified that both Mrs. Skebe and Mr. Saferin picked Thomas Hurley's picture from a group of fifteen photos of white males shortly after the crime (R. 136). Berta Kornfeind identified Kenneth Snyder in court as one of the robbers (R. 30), testified that she picked Snyder's photo the day of the crime (R. 31), and recognized Snyder outside the courtroom the morning of the trial (R. 40). Mr. Saferin testified that he called the police

after the robbers left the store and they arrived about five minutes later (R. 57).

An unindicted participant in the robbery, Martha Harber, testified and corroborated the testimony of Mrs. Skebe, Mrs. Kornfeind, and Alex Saferin.

Mrs. Susan Reichert testified for the defense that she was going to lunch on July 28, 1977 (R. 232), when she saw two men jump in a car and pull away (R. 228); two days later she told the police (R. 229) what she saw; the police were on the scene three minutes after she saw the men pull away in a green car (R. 229). Mrs. Reichert told the police that she could not identify the men (R. 230); she still would not recognize the men (R. 228), and she refused to exclude the defendants at trial (R. 233). Mrs. Reichert did not testify that she saw the robbery or had any reason to believe that the men she saw driving away were involved in any way.

Both Snyder and Hurley were found guilty as charged.

REASONS FOR DENYING THE WRIT

1. The petitioner was not prejudiced by the representation of his court-appointed counsel for his appeal because no conflict of interest issue exists.

In this case, the petitioner was appointed counsel for purposes of appeal; said counsel being the same attorney who represented petitioner's alleged accomplice. Prior to the trial, the State requested immunity be extended to this accomplice in exchange for her testimony against petitioner and another co-defendant. The accomplice's testimony was corroborated by the testimony of three eyewitnesses and resulted in the petitioner's conviction. The accomplice was

then discharged and was never and never will be tried for these offenses.

For purposes of appeal, the petitioner's counsel had absolutely no conflict of interest with any other party involved in this case. After the trial court's disposition of this case, the alleged accomplice had no interest in the case at all. Petitioner's counsel had only the interest of petitioner to represent on appeal since his former client, the alleged accomplice, had no interest whatsoever in the appeal process of this case. Consequently, since counsel's former client was not a party to the appeal, no conflict of interest issue exists.

2. The petitioner received competent and adequate assistance of counsel both at the trial and appeal stages of these proceedings.

Since the Supreme Court's decision in *Powell v. Alabama*, 287 U.S. 45 (1932), there has been an expansion of the scope of the Sixth Amendment right to counsel. However, this expanding scope has not been accompanied by a clear articulation of what level of effectiveness is guaranteed by the Constitution.

A conclusive and universal standard by which to gauge the assistance of counsel has proven to be elusive. Various formulations have been pronounced by the Courts: Counsel should exercise customary skill and knowledge which normally prevails at the time, *Moore v. United States*, 432 F.2d 730, 736 (3rd Cir., 1970); a minimum standard of professional representation, *United States v. Twomey*, 510 F.2d 634, 641 (7th Cir., 1975); reasonably effective assistance of counsel, *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir., 1974). The United States Court of Appeals of the District of Columbia, in *United States v. Decoster*, 624 F.2d 196 (1976), *cert. den.* 100 S. Ct. 302 (1979), an-

nounced a standard by which to gauge effective assistance of counsel; that the claimed inadequacy was a serious incompetency falling measurably below the performance ordinarily expected of fallible lawyers. *Id.* at 206.

The United States Supreme Court has not addressed the question of whether an adjudication of ineffective assistance requires a showing that defense counsel's performance adversely affected the trial's outcome. Several directions have been developed by lower courts on the issue of prejudice and harmless error. Courts have generally required defendants to show either: (1) that counsel's violation resulted in actual prejudice; (2) that counsel's actions resulted in a likelihood of prejudice; or (3) that counsel breached his duty and then prejudice would be presumed. See, *United States v. Decoster, supra.*

The test in Ohio as to whether an individual has been denied effective counsel was initially set forth in *State v. Hester*, 45 Ohio St. 2d 71 (1976). The Ohio Supreme Court formulated the following test:

> "Balancing the rights of the accused and the public, we hold the test to be whether the accused, under all the circumstances . . . had a fair trial and substantial justice was done." *Id.* at 79.

The Ohio Supreme Court further defined the standard in *State v. Lytle*, 48 Ohio St. 2d 391 (1976). The Court promulgated a two-step process that should be employed by courts considering allegations of ineffective assistance of counsel.

> "First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the

defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." 48 Ohio St. 2d at 396.

Petitioner bears the burden of showing a substantial violation of defense counsel's essential duties; since in Ohio a properly licensed attorney is presumably competent. *Vaughn v. Maxwell*, 2 Ohio St. 2d 299 (1965); *State v. Williams*, 19 Ohio App. 2d 234 (1969).

Not only must petitioner allege a substantial violation, but he also bears the burden of submitting evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and also that the defense was prejudiced by counsel's ineffectiveness. *State v. Jackson*, 64 Ohio St. 2d 107, 111 (1980).

Petitioner's broad assertions, unsupported by a demonstration of prejudice do not warrant a hearing. *State v. Jackson, supra* at 111, 112.

Based on the facts of this case, the applicable law and the record of proceedings, the State respectfully requests that this Honorable Court deny Petitioner's Writ of Certiorari.

CONCLUSION

Petitioner, Kenneth Snyder, received a fair trial at which evidence was presented that the victims identified him from photographs shortly after the crime. The petitioner was identified by two eyewitnesses in open court.

The petitioner in this appeal attempts to re-try the facts, the weight of the evidence, and the credibility of the witnesses. His two motions for new trial all attempt to impeach or discredit witnesses who were fully cross-examined before the jury. All of petitioner's questions of law are without merit and therefore should be overruled.

In view of the foregoing, it is respectfully requested that the petitioner's writ to seek this Court's jurisdicton should be denied.

Respectfully submitted,

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